New Brunswick Human Rights Commission
Guideline on Pregnancy Discrimination
Last Reviewed June 2011

Please Note

The New Brunswick Human Rights Commission ("Commission") develops guidelines as part of its mandate to prevent discrimination. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* ("*Code*").

This guideline gives the Commission's interpretation of the provisions of the *Code* relating to discrimination on the basis of sex, in particular pregnancy, as set out in sections 3 to 7 of the *Code*.[1] It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission's staff.

1. Discrimination on the Basis of Pregnancy

"Sex discrimination" includes discrimination based on pregnancy, the possibility of pregnancy or circumstances related to pregnancy.[2]

The *Code* prohibits discrimination (whether it is intentional or not) based on pregnancy in areas such as employment, housing, public services (i.e. schools, hospitals, restaurants, malls, and insurance), and membership in labour unions and professional associations.[3]

How is pregnancy defined under the *Code*?

- Pregnancy includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period and breastfeeding.[4]

Possibility of Pregnancy

- The *Code* prohibits discrimination against a woman because she is of childbearing age and may become pregnant.[5]

What are "circumstances related to pregnancy"?

Circumstances related to pregnancy include, but are not limited to:

- Medical complications due to pregnancy or childbirth;
- Abortion or conditions arising as a result of abortion;
- Miscarriage or stillbirth or conditions arising as a result of a miscarriage or stillbirth;[6]

- Fertility treatment/family planning;
- Reasonable recovery time after childbirth;
- Breastfeeding.[7]

2. Employment

It is a violation of the *Code* for an employer to discriminate against an employee or a potential employee because she is pregnant, is planning to become pregnant, or may become pregnant.

The *Code* prohibits discrimination in all aspects of full-time, part-time, permanent, casual or probationary employment. It also applies to unpaid or volunteer employment, employment recruiters and agencies, trade unions and occupational associations.[8]

HIRING:
When hiring new employees, it is a violation of the *Code* for an employer to:

- Ask a potential employee in an application or during an interview whether or not she is, or is planning to become pregnant;
- Ask an applicant if she is using birth control;
- Post a job ad that excludes pregnant women;
- Not hire a candidate because she is, or is planning to become, pregnant;
- Withdraw an employment offer upon finding out that the candidate is, or may become pregnant;[9]
- Not hire a pregnant woman for a contract of fixed duration because she begins her maternity leave before the contract is completed.[10]

The narrow exception is where it is a genuine qualification relevant to job performance that the successful applicant is not pregnant, and reasonable accommodation of pregnancy or the possibility of pregnancy would create undue hardship to the employer.

DURING EMPLOYMENT:
Under New Brunswick human rights laws, employers cannot:

- Refuse to renew an employment contract because an employee was pregnant, is pregnant, or is planning to become pregnant;[11]
- Demote a woman because she is, or is planning to become pregnant;[12]
- Withhold a promotion, or fail to consider an employee for a promotion because of pregnancy;[13]
- Terminate or lay off (even with notice) a woman because she is pregnant;[14]
- Force a pregnant employee to resign by changing working conditions unacceptably (constructive dismissal).

Example of Constructive Dismissal:
A pregnant full-time worker at a nursery had presented her employer with a note, written by her physician, which stated that she should not be spraying pesticides because of her pregnancy. The employer offered her a reduced work schedule of two days per week, despite the fact that the worker could continue to work full-time and there were a number of jobs suitable to her skill level. The employer was found to have discriminated against the pregnant employee by constructively dismissing her. [15]

DUTY TO ACCOMMODATE:
Sometimes the health-related consequences of a woman's pregnancy may prevent her from doing part of her job, or she may require some kind of accommodation in order to do her job while pregnant.

The *Code* requires an employer to modify the workplace or make accommodations so the employee can continue to work. An employer has a duty to accommodate pregnant employees to the furthest point possible short of undue hardship.

What is undue hardship?

- Undue hardship occurs if accommodating a pregnant employee would be extremely difficult for an employer.
- The determination of undue hardship depends entirely on the circumstances.
- Examples of undue hardship in this context could include:
    - Extremely high financial costs;
    - A serious disruption to a business;
    - Health and safety considerations.

Examples of Accommodations:

- A temporary change of work location;
- Assignment to alternate or light duties;[16]
- A flexible work schedule to allow the employee to take medical appointments, tests and infertility treatments;
- A change in work or shift schedule;
- A reduction of work hours;[17]
- Breaks during the work day;
- A place to sit during breaks;[18]
- Time off for bereavement because of a miscarriage, stillbirth or abortion;
- Allowing the employee to refuse overtime;
- Leave of absence without pay at the employee's request.

Pregnant employees must reasonably participate in the accommodation process by keeping their employer informed of the kinds of accommodations that they

require. Additionally, pregnant employees may have to provide medical documentation in order to receive specific accommodations. It is also important to note that an accommodation offered by an employer may be a reasonable and acceptable accommodation, even if it is not the employee's preferred accommodation.

LIMITS TO ACCOMMODATION:

Conduct may be found to be non-discriminatory if the organization can show that the limitation, specification or preference on the basis of sex is based upon a *bona fide* ("in good faith") occupational qualification (BFOQ) as determined by the Commission.[19]

In order to be a BFOQ, the standard adopted by the organization must pass the "Meiorin Test".[20] This three part test requires that the standard be:

1. Adopted for a purpose or goal that is rationally connected to the function being performed;
2. Adopted in good faith and in the belief that it was necessary to fulfill that purpose or goal;
3. In fact reasonably necessary to accomplish that purpose or goal, in the sense that the employer, owner or service provider cannot accommodate affected individuals without incurring undue hardship.[21]

Example:

A woman was hired as a live-in caregiver for two young boys. Shortly before the woman began her employment, she told her employer that she was unexpectedly pregnant and suffering from nausea. During this conversation the woman was extremely emotional and upset because the status of her relationship with her boyfriend was uncertain. The next day, the employer decided not to employ the woman because of her pregnancy. The Tribunal concluded that the potential employee had been discriminated against based on pregnancy. The employer satisfied the first two parts of the Meiorin Test, but had failed to satisfy the third part:

1. The standard of being physically and emotionally fit to care for two young boys was a reasonable one and was rationally connected to the work.
2. The standard of being physically and emotionally fit was adopted in good faith and in the belief that this standard was necessary in order to care for the two young boys.
3. The employer did not satisfy the third step of the test because no attempt was made to accommodate the pregnant employee in order to determine if accommodation was possible without causing undue hardship to the employer.[22]

Please see the New Brunswick Human Rights Commission Guideline entitled *Guideline for BFOQ's and BFQ's and the Duty to Accommodate* for more information.

EMPLOYEE BENEFIT PLANS:

It is a violation of the *Code* for employee benefit plans to disadvantage pregnant women. In addition, maternity leave should be included in employee benefit plans without it having to be categorized as an illness, accident, or disability.[23]

If a pregnant woman must be absent from work due to health-related reasons (regardless of whether these health-related reasons are related to her pregnancy) she should be permitted to take sick leave or disability leave and be compensated under these benefit plans for her health-related absence.[24] This applies throughout the pregnancy, during pre-delivery, child-birth and the recovery from child birth period.

> **Example:**
> An employee notified her supervisor that she intended to take maternity leave and parental leave after the birth of her child. She also requested to apply some of her accumulated sick leave for the time after the delivery that she was unable to work for medical reasons. The employer denied her request for sick leave. Since pregnancy was the only reason for denying her sick leave benefits, the employer's action constituted sex discrimination.[25]

If an employer pays the benefit premiums while employees are away sick, then they must also pay them while an employee is away on maternity leave.[26]

If an employer continues to provide employment-related benefits, such as extended health, dental or pension benefits to employees who are on other types of leave (disability, sabbatical, etc.), then they must also continue to provide these benefits to employees on maternity or parental leave.

If the employer does not have a sick leave plan or the pregnant employee has not accumulated enough sick leave days, she may go on leave without pay or use vacation time if she must continue to be absent from work due to health-related reasons.

It is important to note that benefit plans differ between employers. Check with your employer for information about your own benefit plan. If you are covered by a collective agreement, you can check with your union for more information.

MATERNITY LEAVE & PARENTAL LEAVE:

The New Brunswick *Employment Standards Act* guarantees all eligible pregnant employees the right to unpaid maternity leave,[27] and entitles all eligible parents, natural or adoptive, to unpaid parental/child care leave.[28] For detailed information regarding eligibility please contact the *New Brunswick Department of Post-Secondary Education, Training and Labour (http://www.gnb.ca/labour)*

Maternity Leave

- Maternity leave is a leave of absence from work for up to 17 weeks.
- Maternity leave can begin no sooner than 11 weeks before the probable delivery date.
- An employee must give their employer at least four months notice prior to her expected due date or as soon as her pregnancy is confirmed, whichever is later.

Parental Leave

- In addition to maternity leave, employees may also take parental leave which is up to 37 weeks of unpaid leave.
- The maximum combined duration of maternity and parental leave is 52 weeks.
- Parental leave can begin no sooner than on the day a newborn or adopted child comes into the care and custody of the employee.
- Parental leave can be divided up between parents, but it cannot exceed 37 weeks.

Wages, Compensation, & Seniority

- Employers are not required to continue to pay the wages of employees on maternity/parental leave.
- An employee can apply for maternity and parental benefits from the Federal Employment Insurance Program.[29]
- An employee can use any earned overtime, vacation time or any other earned time before her baby is born, so long as it does not create undue hardship for the employer.[30]
- An employee's seniority continues to accumulate during maternity and/or parental leave.[31]

Eligible workers who are away from work due to pregnancy, childbirth or adoption may be entitled to pregnancy and parental benefits under Employment Insurance Act ("EIA") a federal program administered by Service Canada. The EIA may also provide sick benefits for absences due to medical reasons related to pregnancy. For detailed information on benefits under the EIA, please contact *Service Canada. (http://www.servicecanada.gc.ca/).*

RETURNING TO WORK:
Upon return from maternity and/or parental leave, the employee should return to his/her most recent job or a similar one if that job no longer exists.[32] Employees returning from maternity/parental leave can not be demoted upon their return to work.[33]

Employers are allowed to make changes to an employee's position while they are on maternity/parental leave so long as the changes are necessary, the employee is kept informed, and the employee is reasonably accommodated and included in any new training.[34]

If there is confusion regarding whether or not an employee is planning to return to work following their maternity and/or parental leave, then it is up to the employer to clarify what the employee's intentions are.[35]

3. Breastfeeding

The *Code* prohibits discrimination by employers or service providers against women who are breastfeeding. Breastfeeding includes pumping or expressing milk, as well as nursing directly from the breast.

Under the *Code* employers and services providers must accommodate breastfeeding by employees, customers or clients, short of undue hardship.

Examples of Accommodation:

- Providing a quiet, private space for breastfeeding if requested by an employee, client or customer;
- Granting an employees' request for unpaid time off for longer lunch hours or breaks, or allowing an employee to finish work early, so that they may breastfeed their infant or pump breast milk at a regular time;[36]
- Allowing employees to have their infants brought into the workplace so that they may breastfeed;[37]
- Providing access to cooled storage for expressed milk;
- Providing seating so that a customer or client may breastfeed.

In addition, an employer may not request medical documentation in order to grant breastfeeding accommodations at the workplace.[38]

Breastfeeding women have the right to breastfeed in public; therefore, it is discriminatory to ask a nursing mother to stop, to move to another location, or to be more discreet, without reasonable cause.[39]

4. Housing, Services, Goods and Facilities

The *Code* prohibits discrimination against pregnant women, breastfeeding women, or women with newborn babies in housing, services, goods and facilities.[40] This includes rental units, educational institutions, hospitals and health services, insurance providers, and public places like malls, parks, public transit, stores and restaurants.

This means that pregnant women, women who are breastfeeding or women who have newborn babies with them, must be accommodated to the point of undue hardship and they must not be denied service or access unless there is a *bona fide* ("in good faith") reason for doing so.

Examples of Discrimination:

- Refusing rental accommodations to tenants who are pregnant, or who have newborn infants;[41]
- Requiring customers/clients to breastfeed somewhere where they can not be seen;[42]
- Evicting a woman because she has become pregnant.[43]

Examples of Accommodations:

- Providing a clean, quiet space where customers/clients can choose to breastfeed;
- Allowing for the reasonable noise that a newborn may cause in a rental situation.

5. For More Information

For further information about the *Code* or this policy, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at www.gnb.ca/hrc-cdp or email us at hrc.cdp@gnb.ca

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[1] The Commission would like to acknowledge and thank the human rights commissions from various jurisdictions across Canada for the opportunity to study and draw from their policies and documents on pregnancy.

[2] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 [*Brooks*].
See also: *Human Rights Act*, R.S.N.B. 1973, s.2.

[3] *Human Rights Act*, R.S.N.B. 1973, ss. 3-7.

[4] The length of the post-delivery period covered by human rights protections is dependent on the circumstances of the mother: *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.); *Parcels v. Red Deer General & Auxiliary Nursing Home (Dist. No. 15)* (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.) [*Parcels*].

[5] *Wiens v. Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd. Inq.). The employer refused to employ women of childbearing age in an area of its plant where there was a risk of accidental emissions of nickel carbonyl gas, which could harm a fetus. The Board of Inquiry found that this policy was discriminatory because it restricted opportunities for all women who had the potential to become pregnant. Any woman who knows she is pregnant, or who intends to become pregnant could be transferred from this section until after she has given birth.

[6] *Tilsley v. Subway Sandwiches* (2001), 39 C.H.R.R. D/102 (B.C.H.R.T.). A woman was fired for not showing up to work when she was in the hospital because of a miscarriage. The Tribunal ruled that discrimination because of a miscarriage is a form of discrimination based on sex.
See also: *Osvald v. Videocomm Technologies Inc.*, 2010 HRTO 770, CHRR Doc. 10-0918.

[7] *Poirier v. British Columbia (Ministry of Municipal Affairs, Recreation and Housing)* (1997), 29 C.H.R.R. D/87 (B.C.H.R.T.). The Tribunal ruled that differential treatment of a woman because she is breastfeeding is a form of sex discrimination.

[8] *Human Rights Act*, R.S.N.B. 1973, s.3.

[9] *Century Oils (Canada) Inc. v. Davies*, [1988] B.C.J. No. 118 (B.C.S.C.).
See also: *Dorvault v. Ital Décor Ltd. (No.3)*, 2005 BCHRT 148, 52 C.H.R.R. D/136.; *Young v. 633785 B.C. Ltd.*, 2004 BCHRT 135, CHRR Doc. 04-264.; *Maciel v. Fashion Coiffures Ltd. (No.3)*, 2009 HRTO 1804, CHRR Doc. 09-2373.

[10] *United Nurses of Alberta, Local 115 v. Calgary Health Authority*, [2004] A.J. No.8 (C.A.). A nurse was denied a fixed-term 9 month contract because she was pregnant and was planning on going on maternity leave half-way through the contract. The Court of Appeal found that although availability is an implied term of the contract, it is not a *bona fide* occupational qualification; therefore, the hospital had a duty to accommodate the pregnant nurse to the point of undue hardship.

[11] *Gilmar v. Alexis Nakota Sioux Nation Board of Education*, 2009 CHRT 34, CHRR Doc. 09-2338. A teacher became pregnant prior to her second one-year contract with the Alexis school board. She began her maternity leave half-way through the second contract. Consequently, she was not given a third one-year contract for the following school year. The Tribunal ruled that the school board had discriminated against the teacher by refusing to renew her contract because of her pregnancy.

[12] *Dance v. ANZA Travel Ltd. (No.3)*, 2006 BCHRT 148, CHRR Doc. 06-235.

[13] *de Lisser v. Traveland Leisure Vehicles Ltd.*, 2009 BCHRT 36, CHRR Doc. 09-0190.; *Magee v. Warner Lambert Canada* (1990), 12 C.H.R.R. D/208 (B.C.H.R.C.).

[14] For recent examples see: *Baker v. Crombie Kennedy Nasmark Inc.* (2006), CHRR Doc. 06-327 (Alta. H.R.P.).; *Serben v. Kicks Cantina Inc.* (2005), CHRR Doc. 05-159 (Alta. H.R.P.).; *Ballendine v. Wiloughby (No.5)*, 2009 BCHRT 33, CHRR Doc. 09-0106.; *Johnston v. Poloskey*, 2008 BCHRT 55, CHRR Doc. 08-079.; *McIlwraith v. Eva's Restaurant and Lounge* (2006), 56 C.H.R.R. D/203 (P.E.I.H.R.P.).

[15] *Sidhu v. Broadway Gallery* (2002), 42 C.H.R.R. D/215 (B.C.H.R.T.).

[16] *Lord v. Haldimand-Norfolk Police Services Board* (1995), 23 C.H.R.R. D/500 (Ont. Bd.Inq.). A police officer requested light duties for the last stages of her pregnancy. The Police Service had a "no modified duties" policy, so her request was denied. The Board of Inquiry ruled that the "no modified duties" policy adversely affects pregnant women as it fails to recognize their special needs.
See also: *Hoyt v. Canada National Railway Co. (No.2)*, 2006 CHRT 33, 57 C.H.R.R. D/437.; *Emrick Plastics v. Ontario (Human Rights Commission)* (1992), 16 C.H.R.R. 300 (Div. Ct.).

[17] *Stackhouse v. Stack Trucking Inc. (No.2)*, 2007 BCHRT 161, 60 C.H.R.R. D/119. A pregnant garbage truck driver informed her employer that she needed to reduce her work hours from 11.5 hours/day to 10 hours/day on the advice of her physician. Her employer seemed to accept this request, but later fired the pregnant employee for leaving her shift "early". The Tribunal found that the employer failed to adequately accommodate the pregnant employee.

[18] *McIntosh v. Shami*, 2006 BCHRT 527, CHRR Doc. 06-720. The Tribunal ruled that the employer failed to reasonably accommodate a female employee's pregnancy by failing to provide her with a place to sit and rest at her workplace.
See also: *Williams v. Hudson's Bay Co. (No.2)*, 2009 HRTO 2168, CHRR Doc. 09-2818.

[19] *Human Rights Act*, R.S.N.B. 1973, ss. 3(5), 4(4) and 5(2).

[20] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

[21] New Brunswick Human Rights Commission Annual Report 2002-2003, pp.13-14.

[22] *Mazuelos v. Clark*, 2000 BCHRT 1, 36 C.H.R.R. D/385.

[23] *Brooks, supra* note 2.

[24] *Brooks, supra* note 2. Pregnant employees who are absent from work for health-related reasons caused by their pregnancy can not be treated differently or adversely from employees who are absent for other health-related reasons.

[25] *Parcels, supra* note 4.

[26] *Parcels, supra* note 4.

[27] *Employment Standards Act*, S.N.B. 1982, c. E-7.2, ss. 42-44.

[28] *Employment Standards Act*, S.N.B. 1982, c. E-7.2, , s. 44.02

[29] For more information on Employment Insurance (EI) visit the Service Canada website at: http://www.servicecanada.gc.ca/eng/ei/menu/eihome.shtml

[30] Becoming a Parent in Alberta. Government of Alberta, Human Resources and Development, March 2009.

[31] *Lavoie v. Canada (Treasury Board) (No.2)*, 2008 CHRT 27, CHRR Doc. 08-379. The Term Employment Policy was found to be discriminatory based on the fact that periods of maternity or parental leave without pay were not counted in calculating the cumulative three-year working period required for term employees to achieve permanent employee status.

[32] *Parry v. Vanwest College Ltd.*, 2005 BCHRT 310, 53 C.H.R.R. D/178.

[33] *Germain v. Groupe Major Express Inc.*, 2008 CHRT 33, CHRR Doc. 08-468.

[34] *Kung v. Peak Potentials Training (No.3)*, 2010 BCHRT 41, CHRR Doc. 10-0328.

[35] *Philips v. Distinctive Vertical Venetians Mfg. Ltd.* (2006), CHRR Doc. 06-853 (Sask.H.R.T.).

[36] *Cole v. Bell Canada*, 2007 CHRT 7, 60 C.H.R.R. D/216 [*Cole*].

[37] *Poirier v. British Columbia (Ministry of Municipal Affairs, Recreation and Housing)* (1997), 29 C.H.R.R. D/87.

[38] *Cole, supra* note 36.

[39] *Valle v. H&M Hennes & Mauritz Inc.*, 2008 BCHRT 456, CHRR Doc. 08-1046 [*Valle*].

[40] *Human Rights Act*, R.S.N.B. 1973, ss. 4-5.

[41] *Segin v. Chung*, 2002 BCHRT 42, CHRR Doc. 02-0223. The Tribunal found that the landlord discriminated on the basis of sex when it refused to rent an apartment to a pregnant woman because of concerns about liability should the baby fall down the stairs in the apartment building.

[42] *Valle, supra* note 39.

[43] *Peterson v. Anderson* (1992), 15 C.H.R.R. D/1 (Ont. Bd. of Inq.).